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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

PATRICK ROLAND LECOUC,

Defendant and Appellant.

G051781

(Super. Ct. No. 13HF1295)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Thomas A. Glazier, Judge. Affirmed.

Denise M. Rudasill, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor and Kristen Kinnaird Chenelia, Deputy Attorneys General, for Plaintiff and Respondent.

Patrick Roland Lecou appeals from the order denying his petition to have his conviction for grand theft reduced to a misdemeanor pursuant to Penal Code section 1170.18.<sup>1</sup> Lecou argues the trial court erred by concluding the particular species of grand theft he was convicted of—the crime of selling, transferring, or conveying an access card with intent to defraud and without the cardholder’s or issuer’s consent (§ 484e, subd. (a)), does not qualify for resentencing relief. We find no error and affirm the order.

Section 490.2, the statute Lecou relies upon to establish his resentencing eligibility, applies to theft offenses where the value of money, labor, or property “obtain[ed] . . . by theft” does not exceed \$950. But his offense did not involve obtaining anything by theft. Instead, he was convicted of *selling, transferring or conveying* an access card. Because the crime Lecou committed was not the type described in section 490.2, he made no showing it was eligible for resentencing relief under section 1170.18.

#### FACTS

On April 17, 2013, Lecou was charged by felony complaint with two counts of second degree commercial burglary, both involving alleged entry into a Target store with the intent to commit larceny, in violation of sections 459-460, subdivision (b) (counts 1 and 2); one count of selling, transferring, or conveying an access card with intent to defraud in violation of section 484e, subdivision (a) (count 3); and one count of receiving stolen property in violation of section 496, subdivision (b) (count 4.). The complaint further alleged Lecou had three prison priors within the meaning of section 667.5, subdivision (b), and that he also had a prior strike conviction of the type described in sections 667, subdivisions (d) and (e)(1), and 1170.12, subdivisions (b) and (c)(1).

Lecou initially pleaded not guilty to the charges, but in May 2013 he withdrew his not guilty plea and pleaded guilty to count 1 (alleging he committed second degree commercial burglary in violation of sections 459-460, subd. (b)), and count 3

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<sup>1</sup> All further statutory references are to the Penal Code, unless otherwise indicated.

(alleging he sold, transferred or conveyed an access card with intent to defraud in violation of section 484e, subd. (a)). He also admitted the prison and strike priors, and received a stipulated sentence of three years in prison.

In January 2015, Lecou petitioned to have his convictions on both counts reduced to misdemeanors, pursuant to section 1170.18. The district attorney opposed the petition in part, arguing Lecou's conviction for violating section 484e, subdivision (a), was not eligible for reduction to a misdemeanor. The trial court agreed, granting Lecou's petition only to the extent of his conviction for second degree burglary.

### DISCUSSION

Section 1170.18, enacted in 2014 as part of Proposition 47 (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1092), states in pertinent part that "[a] person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under [Proposition 47] ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with . . . this act." (§ 1170.18, subd. (a).)

Subdivision (b) of section 1170.18 requires the court, "[u]pon receiving a petition under subdivision (a)," to "determine whether the petitioner satisfies the criteria in subdivision (a)." (§ 1170.18, subd. (b).)

Lecou contends the trial court erred by concluding his conviction for violation of section 484e, subdivision (a), was not eligible for resentencing under section 1170.18 because the offense would not have qualified as a misdemeanor under Proposition 47. We find no error in the court's ruling.

Section 484e describes several distinct crimes involving access cards and access card information: subdivision (a), the offense Lecou was convicted of, covers a "person who, with intent to defraud, *sells, transfers, or conveys, an access card*, without the cardholder's or issuer's consent"; subdivision (c) covers a "person who, with the

intent to defraud, *acquires or retains possession of an access card* without the cardholder's or issuer's consent, with intent to use, sell, or transfer it to a person other than the cardholder or issuer"; and subdivision (d) covers a "person who *acquires or retains possession of access card account information* with respect to an access card validly issued to another person, without the cardholder's or issuer's consent, with the intent to use it fraudulently."<sup>2</sup> (§ 484e, subds. (a), (c) & (d), italics added.) Although the offense described in subdivision (c) of section 484e is characterized as a petty theft, the other offenses, including the one Lecou was convicted of, are characterized as grand theft.

In arguing that his violation of section 484e, subdivision (a), is eligible for reclassification as a misdemeanor, Lecou relies on section 490.2—a provision added by Proposition 47. Section 490.2, subdivision (a), redefines certain theft offenses—even those expressly characterized as "grand theft"—as misdemeanors if they involve property valued at less than \$950: "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars (\$950) shall be considered petty theft and shall be punished as a misdemeanor. . . ."

According to Lecou, section 490.2 applies to all "crimes defined as grand theft" and requires that all such "grand theft" crimes—including his violation of section 484e, subdivision (a)—be redesignated as misdemeanors if the value of the property or money taken does not exceed \$950. But that is not the case.

In fact, section 490.2 does not apply *to* all crimes defined as "grand theft." Instead, it applies "[n]otwithstanding . . . any other provision of law defining grand

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Subdivision (b) of section 484e covers a "person, other than the issuer, who within any consecutive 12-month period, acquires access cards issued in the names of four or more persons which he or she has reason to know were taken or retained under circumstances which [otherwise violate the statute]."

theft.” What it applies *to* is crimes defined by the act of “*obtaining . . . property by theft.*” (§ 490.2, subd. (a), italics added.) “Theft,” in turn, is defined in section 484 in terms of a “person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another.” (§ 484, subd. (a).)

And section 484e, subdivision (a), does not describe a crime in which property is obtained by theft. Instead, it describes a crime committed when an access card is *sold, transferred, or conveyed*. Completing that crime does not require the person have *obtained* anything, by theft or otherwise. Consequently, section 484e, subdivision (a), is not the type of crime that section 490.2 would reclassify as a misdemeanor if the value of the property *taken* was \$950 or less.

But even if section 484e, subdivision (a), were the type of crime that could, in theory, be reduced to a misdemeanor under section 490.2, we would reject Lecou’s contention that it involved property valued at less than \$950 in this case. He argues his offense involved less than \$950 because “he used the access card to obtain merchandise that did not cost more than \$950.” But that claim, even if it were supported by evidence in the record, would not be relevant. The violation of section 484e, subdivision (a), has nothing to do with *the use* of an access card to obtain merchandise.

Instead, it is section 484g which makes it a *separate crime* for a defendant to actually use the access card or account information to “obtain[ ] money, goods, services, or anything else of value.” And under that statute, if the value of the money, goods, services, or anything else of value obtained by use of the access card or

information exceeds \$950 in any consecutive six-month period, the defendant is guilty of grand theft. (§ 484g.) Thus, a defendant who uses access card information to obtain goods may be charged with either grand theft or petty theft under section 484g, depending upon the total value of the goods. Had Lecou been charged with a violation of section 484g, the value of the goods he obtained using the access card would be the key to assessing the seriousness of that crime.

By contrast, a violation of section 484e, subdivision (a), is a felony, without regard to what the defendant may have otherwise done with the card he “sells, transfers, or conveys.” (§ 484e, subd. (a).) We find no error in the trial court’s denial of Lecou’s petition to reclassify that offense as a misdemeanor pursuant to section 1170.18.

#### DISPOSITION

The order is affirmed.

O’LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

FYBEL, J.